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No. 96-440

In the
Supreme Court of the United States
October Term, 1996

Paul W. Bergstrom, Joseph S. Friedberg
and Gregory J. Semanko,

Petitioners,

v.

The Dalkon Shield Claimants Trust,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. RESPONDENT'S BRIEF IN OPPOSITION CONTAINS MISSTATEMENTS OF FACT

The respondent makes several factual misstatements which provides the Court with an inaccurate understanding of the facts giving rise to the proceedings below. First, respondent alleges that when Robins' Plan of Reorganization was consummated on December 15, 1989, "no excess [Trust funds] was expected" to exist after all Dalkon Shield claimants had been paid. As a result, the respondent

suggests, no future pro rata distribution of the trust residue was anticipated at Plan consummation. (Oppo. Brief. 7). This allegation is nonsense.

On the consummation date, the Claimants Trust was funded with approximately ***$2,335 billion*** and with the express expectation that additional "***hundreds of millions***" would accrue over time in the form of investment income. (Pet. App. 1f). Because this substantial sum far exceeded what four of the five parties to the bankruptcy estimated as necessary to satisfy all Dalkon Shield claims,[1] the Petitioners, their clients and a majority of others, reasonably *expected* that there would be excess funds remaining for a future pro rata distribution following the settlement and release of their claims.

Second, the respondent represents that the excess trust funds now available for pro rata distribution to claimants "resulted from $800 million of investment income . . . and from the Trust's spectacular success at controlling administrative costs . . .." (Oppo. Brief 5). While Petitioners do not dispute the trustees' frugal administration of the Claimants Trust, or that investment of the trust corpus generated substantial investment income[2], only $1.3 billion of the Claimants Trust's original $2.335 billion funding

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[1]The district court's 1987 estimation hearings produced the following estimates of the aggregate value of Dalkon Shield-related claims: *Robins* -- .8 to 1.3 billion; *Equity Security Holders* – 1.03 billion; *Unsecured Creditors* – 1.54 billion; *Aetna* – 2.2 to 2.5 billion; and *Claimants Committee* – 4.2 to 7 billion. *In re A.H. Robins Co., Inc.*, 880 F.2d 694, 699 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

[2] The Claimants Trust Agreement *required* the trustees to invest the trust corpus but restricted their investment choices to conservative programs. (Pet. App. 5e-7e). Thus, the amount of investment income generated over time is largely a product of a healthy U.S. economy and not the result of the trustees' creative investment strategies.

payment had actually been used to satisfy Dalkon Shield claims as of the March 1, 1995 Disallowance Order. (Pet. App. 14a). Therefore, the bulk of the excess funds now available for pro rata distribution to claimants, approximately $1.0 billion's worth, represents a very large un-used portion of the *original* trust funding payment and not administrative savings and investment income as the respondent would have this Court believe.

Finally, the respondent falsely identifies the "district court, sitting in bankruptcy" as the entity which "formulated" Robins' Plan of Reorganization (Oppo. Brief 2) -- as if that fact alone provides the district court with an equitable license to redistribute the contract rights of Petitioners and their clients. Actually, the district court specifically rejected the notion that it served as the Plan's author during oral argument on the joint Motion to Vacate the Disallowance Order:

> It wasn't my [P]lan, that is for sure. I only participated in one aspect . . . one of the lawyers wanted to be indemnified . . .. I said you can forget the [P]lan. Don't call me again, because I would never approve. That was my only contribution . . ..

(Tr. at 516-17).

II. RESPONDENT'S BRIEF IN OPPOSITION CONTAINS MISSTATEMENTS OF LAW

The respondent provides this Court with citations to three opinions in which, it claims, the lower court "repeatedly" held that "[a]ny proceeding that would affect the operation of the Trust is . . . 'related to' the bankruptcy case under § 1334(b)." (Oppo. Brief 7). Contrary to respondent's

representations, however, the lower court never addressed the nature of "related to" proceedings under § 1334(b) in those cases. In fact, *In re A.H. Robins Co., Inc.*, 880 F.2d 779 (4th Cir. 1989) and *In re A.H. Robins Co., Inc.*, 42 F.3d 870 (4th Cir. 1990) do not even *mention* § 1334, much less equate proceedings affecting Trust operations as proceedings "related to" the bankruptcy case within the meaning of that statute.

Respondent's citation to *In re A.H. Robins Co., Inc. (Official Dalkon Shield Claimants' Committee v. Mabey)*, 880 F.2d 769 (4th Cir. 1989)[3] is equally off-point. In *Mabey*, the court below held that certain pre-consummation orders entered by the district court were valid exercises of its power of "continuing supervision" – a power which the district court's Confirmation Order specifically preserved as a condition of confirmation in order to assure Plan feasibility as required under the Bankruptcy Code. *Id.* at 776. Although the respondent suggests otherwise, the question of whether a proceeding affecting Trust operations constitutes a "related to" proceeding under § 1334(b) was simply not at issue. Indeed, the opinion does not even contain the phrase "related to", and its fleeting citation to § 1334(b) is merely interjected as one of eight statutory sources to further support the district court's *power* of continuing supervision over the Trust for purposes of Plan feasibility. *Id.*

In short, neither the Fourth Circuit nor any other circuit court of appeals has ever held that a proceeding affecting the post-confirmation/consummation operations of a distribution trust constitutes a proceeding "related to" the

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[3]Respondent also represents that this Court denied a petition for certiorari in *Mabey* at 493 U.S. 959. (Oppo. Brief 7 (footnote)). The respondent is wrong. According to *Shepard's United States Citations*, this Court *never* reviewed the Fourth Circuit's decision in *Mabey* on petition for certiorari.

chapter 11 case for purposes of establishing jurisdiction in a federal court under § 1334. Respondent's representations to the contrary are false.

III. RESPONDENT NEITHER ADDRESSES, NOR ATTEMPTS TO RESOLVE, CONFLICTS BETWEEN THE LOWER COURT'S DECISION AND DECISIONS OF OTHER COURTS OF APPEALS

As illustrated in the Petition, the lower court's holding with regard to the type of proceedings which "arise in" a case under Title 11 within the meaning of § 1334(b) is squarely at odds with the holdings of the Fifth and Ninth Circuits. (Pet. 10-14). Yet, the respondent does not confront or attempt to resolve this conflict in its brief.

Moreover, the Fourth Circuit's conclusion that a proceeding can be "related to" a case under Title 11 within the meaning of § 1334(b), following Plan confirmation and without any possible effect on the discharged debtor, is a holding which this Court knows to be in direct conflict with every other circuit court of appeals. (Pet. 14-17). The court below has effectively rejected the Third Circuit's decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984) as "too restrictive" for its purposes (Pet. App. 20a) and adopted a jurisdictional approach which expands the subject matter jurisdiction of the federal courts far beyond the limitations imposed by Congress and demanded by Article III of the United States Constitution. (Pet. App. 1i).

Rather than attempt to resolve this conflict, the respondent skirts the issue entirely by declaring an impact or

effect on the *debtor* to be an "absurd" suggestion[4]. (Resp. at 7). If requiring a proceeding to impact the debtor in some conceivable manner is truly an absurd proposition as respondent suggests, then this Court should intervene, if for no other reason, to definitively over-rule *Pacor* and establish a more suitable approach to determining federal subject matter jurisdiction over "related to" proceedings under § 1334(b).

The respondent also ignores the conflicting positions in the circuit courts on the issue of whether a federal district court can enter an order modifying a contingent fee agreement in the absence of a case or controversy between the attorney and client. The conflict between the Fifth and Fourth Circuits on this constitutional issue is absolute. (Pet. 18-19). If the Fifth Circuit is correct, then the Fourth Circuit's decision in the case below is necessarily wrong. There is no middle-ground in matters of jurisdiction.

The reason for the respondent's consistent ostrich-like response to the fundamental conflicts of law identified in the Petition is clear. The respondent, like the Petitioners, is incapable of resolving such divergent opinions because they are irreconcilable. Only this Court can resolve these conflicts by determining which circuit court's understanding of "arising in" and "related to" proceedings is most harmonious with the intent of Congress and the Framers of

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[4]Respondent also identifies two "crucial facts" which it apparently believes to impart subject matter jurisdiction in the district court under § 1334(b) for purposes of disallowing Petitioners' attorneys fees. (Oppo. Brief 8). These facts, which concern the Trust's self-imposed mission to protect claimants from attorney over-reaching in fee matters, were certainly not "crucial" to Congress when it drafted § 1334 nor where these facts "crucial" to the Framers when they drafted the Constitution. Such facts are crucial, if at all, only to the *Trust* in fulfilling its role as a fiduciary under Virginia law.

our Constitution.

CONCLUSION

For the reasons stated, and those set-forth in their Petition, Petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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